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Criminal Law Revision Through a Legislative Commission: The New York Experience

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CRIMINAL LAW REVISION THROUGH A LEGISLATIVE COMMISSION: THE NEW YORK EXPERIENCE

An Interview with RICHARD BARTLETT*

Prior to his appointment as Chairman of the New York Temporary Commission on Revision of The Penal Law and Criminal Code in 1961, Richard Bartlett served for three years in the New York Assembly. Before his election to the Assembly, he had practiced law in Glens Falls, New York.

Conducting the interview is Herman Schwartz, Visiting Professor of Law at the University of Michigan Law School.

The date is April 18, 1968.

I. THE GENESIS

A. *The Decision to Revise*

Schwartz: When and how were the decisions made to revise the Penal Law?

Bartlett: I believe there were discussions undertaken very early in Governor Rockefeller's administration.¹ Some of the impetus undoubtedly came from the work of the American Law Institute in connection with the Model Penal Code.² Also, I'm sure some inspiration was derived from what was going on in other states, notably Illinois.³ In any case, in 1961, the Legislature passed a bill suggested by the Governor which created a temporary commission of nine members, three to be appointed by the Governor, three by the speaker of the Assembly, and three by the majority leader of the Senate, to undertake a complete revision of the Penal Law and Criminal Code.⁴ I would say that the attention paid in the Legislature to this bill was minimal at the time it was passed. Immediately upon its passage, a great deal of interest was aroused by the potential this commission offered for performing a significant task for New York.

Schwartz: What was the motivation behind revision of the Penal Law?

Bartlett: First of all, New York had had a Penal Code and a Procedural Code for eighty years. The last significant revision was undertaken by the Field Com-

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1. Governor Rockefeller was first elected on November 4, 1958. The Temporary Commission on Revision of the Penal Law and Criminal Code was created on April 6, 1961.

2. See generally Perkins, *Some Weak Points In The Model Penal Code*, 17 Hastings L.J. 3 (1965); Remington & Rosenblum, *The Criminal Law and The Legislative Process*, 960 U. Ill. L.F. 481; Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097 (1952); *Symposium On The Model Penal Code*, 63 Colum. L. Rev. 589 (1963).

3. Illinois adopted a new Penal Law in 1964. Ill. Ann. Stat. ch. 38 (Smith-Hurd 1964). See generally Bowman, *The Illinois Criminal Code of 1961*, 50 Ill. B.J. 34 (1961).

4. N.Y. Sess. Laws 1961, ch. 346.

mission in the 1860's and '70's, and finally passed in 1881.⁵ It was a hodge podge conglomeration of amendment upon amendment. In some areas of the law, the Legislature dealt in that lovely, traditional game of particularization; for example, there are twenty-odd sections and dozens of subsections defining different kinds of malicious mischief.⁶ Some parts of the Penal Law had been declared unconstitutional,⁷ but still remained on our books. So, in sum, we had a patch-work quilt of statutory criminal law in New York which was badly in need of revision in the simple sense of reorganization.⁸ It was also badly in need of reorganization in terms of concepts of criminal liability and procedure, since it was based on concepts which were felt to be totally out of tune with the needs of the Twentieth Century.⁹

Schwartz: Were there any feelings against revision among the members of the Commission or among any of the people involved in the Commission's early stage?

Bartlett: No. There seemed to be a surprising unanimity of view that the revision was badly needed. When the Governor announced the appointment of the Commission it was greeted generally throughout the state as a desirable thing, with a sort of "Hurrah, let's go" attitude.

Schwartz: What governmental or other agencies were most influential in this decision to begin Penal Law Revision?

Bartlett: Actually, I was not aware of any organized effort on the part of the New York Bar Association or the Law Schools in this state. Expressions had been forthcoming from time to time by such groups, but there had been no *organized* effort on the part of any group. I would say that the movement was largely internal, within the Governor's office itself.

Schwartz: Do you have anything more to add about what you mentioned as the main goals of your work?

Bartlett: Our job was actually to achieve a system of sanctions that reflected

5. Laws of New York 1881, ch. 680, (Penal Code); Laws of New York 1881, ch. 442 (Code of Criminal Procedure).

6. Former N.Y. Pen. Law, art. 134 (McKinney 1944) [hereinafter cited as Former N.Y. Pen. Law]. See N.Y. Legis. Doc. 1962, No. 41, p. 13.

7. Former N.Y. Pen. Law, § 2360 (prohibiting issuance of trading stamps), held unconstitutional in *People ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N.Y.S. 111 (3d Dep't 1902); § 436-d (prohibiting sale of periodicals with title page or other identification marks removed) held unconstitutional in *People v. Bunis*, 9 N.Y.2d 1, 250 N.Y.S.2d 505 (1961).

8. Approximately 373 sections, or parts thereof, of the former Penal Law were transferred to more appropriate chapters of the consolidated and unconsolidated laws. N.Y. Sess. Laws 1965, chs. 1031, 1048. See generally, Sibley, *Overhaul Urged For Penal Code*, N.Y. Times, March 17, 1964, p. 1, col. 7.

9. See generally N.Y. Legis. Doc. 1962, No. 41, pp. 8-13; N.Y. Legis. Doc. 1963, No. 8, pp. 35-44.

society's needs for protection against transgressors, and that gave fair and rational consideration to the freedom and liberty of the person caught up in the processes of criminal justice. We wanted to develop a sentencing system that provided a flexible means of dealing with those convicted of crime.¹⁰ We did not attempt to prepare something which represented simply an ideal. We kept a constant eye on the politics involved, and I suppose this was my primary role. The Commission time and again asked me: "How do you think this is going to look to the Legislature; can we convince them of this point of view?" We didn't consider it our role to develop a model code, as was the purpose of the ALI.¹¹ Our task was to propose a new criminal law, a new system of criminal law, which we thought was in large measure needed, but which was also susceptible of favorable reception by the Legislature.

Schwartz: Did you see any specific, fundamental, substantive defects in the prior Penal Law?

Bartlett: No, it was more its irrationality and inconsistency that caused problems, rather than any single pattern of too heavy handedness, or too light handedness. As I previously indicated, we found an obsession in New York with trying to particularize, and this we endeavored to cure. I'm perfectly sure that, over the years, it will be particularized again. This is the nature of the process. We thought we ought to start out fresh wherever possible, stating, as broadly as was practicable, principles of criminal proscription.

B. Choice of Commission

Schwartz: Who chose the Commission chairman?

Bartlett: The Governor did.

Schwartz: Why?

Bartlett: The Bill provided that, of the nine people named to the Commission, the Governor would designate one as chairman. I was appointed as a member of the Commission by Speaker Carlino.¹² I was, I believe, the only Legislator on the Commission originally.¹³ Subsequently, the Governor designated me from

10. But see Murrah and Rubin, *Penal Reform and The Model Sentencing Act*, 65 Colum. L. Rev. 1167 (1965). See generally, *Survey of the New York State Sentencing Structure As of 1963*, N.Y. Legis. Doc. 1964, No. 14, pp. 16-21; Proposed New York Penal Law, App. A., (Edward Thompson Co. ed. 1964) [hereinafter cited as Prop. Pen. Law]; Flood, *The Model Sentencing Act—A Higher Level of Penal Law*, 9 Crime & Delinquency 370 (1963); Tappan, *Sentencing Under The Model Penal Code*, 23 Law & Contemp. Prob. 528 (1958); Turnbladh, *A Critique of The Model Penal Code Sentencing Proposals*, 23 Law & Contemp. Prob. 544 (1958); Wechsler, *Sentencing Correction, And The Model Penal Code*, 109 U. Pa. L. Rev. 465 (1961).

11. See Wechsler, *The American Law Institute: Some Observations On Its Model Penal Code*, 42 A.B.A.J. 321 (1956); Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097 (1952).

12. Speaker of the Assembly, 1959-64.

13. Assemblyman William Kapelman was also appointed to the Commission by Speaker Carlino. N.Y. Legis. Doc. 1962, No. 41, p. 3.

among the appointees as Chairman. I suspect he chose me because he felt it desirable to have a very close liaison between the Commission and the Legislature. We had just gone through the experience with the Tweed Commission in New York. This committee was dominated by non-Legislators.¹⁴ Largely, and unhappily for the state of New York, its completed work was rejected out of hand by the Legislature.¹⁵ Therefore, I believe that the hope was to avoid that result by naming a Legislator as Chairman.¹⁶ It was anticipated that this would result in the proposals receiving more sympathetic attention from the Legislature. I must say that that probably turned out to be true.

Schwartz: What were some of the reasons, which perhaps you can only speculate about, for choosing the other members?

Bartlett: The others really represented a very broad spectrum of lawyers. The judiciary was represented by Judge Philip Halpern, who at that time was on the Appellate Division, Fourth Department¹⁷; the academic lawyers were represented by Herbert Wechsler, who, as well as being a very substantial figure in the law school world, had also been the reporter for the ALI in their drafting of the Model Penal Code¹⁸; the rest were a cross section of prosecutors, defense lawyers, and just interested members of the Bar.¹⁹

Schwartz: Was any consideration given to including sociologists or penologists on the Commission?

Bartlett: I really can't answer that because I never engaged in any in-depth discussions with either Senator Mahoney,²⁰ Speaker Carlino or the Governor about the bases of their choices.

Schwartz: Were they the three people who appointed the Commission?

Bartlett: Yes.

Schwartz: Was the decision to give those three the appointing power based on the experience with the Tweed Committee?

14. The Tweed Commission was the Temporary Commission on the Courts. Of its original eleven members, only four were legislators, and its chairman was Harrison Tweed, an attorney. The Commission began work in 1953 and ended in 1958. See generally, *The Work of the Temporary Commission On The Courts*, N. Y. Sess. Laws 1956, p. 1329.

15. The Commission presented its final report in 1958. N.Y. Sess. Laws 1958, p. 1683. Despite Governor Rockefeller's appeal for support, the recommendations were never enacted. N.Y. Sess. Laws 1958, p. 1818.

16. The Governor named the chairman and vice-chairman of both Commissions. Mannel, *Legislature*, State of New York at 741 (1954); *id.* at 704 (1961-62).

17. Acting Dean, University of Buffalo, School of Law, 1943-45, 1952-53, Dean 1945-47; Justice, New York Supreme Court 1947-63, Appellate Division, 1952-63; deceased 1963. For a discussion of Judge Halpern's scholarly pursuits, see 13 *Buffalo L. Rev.* 302 (1964).

18. Professor of Law, Columbia University; Chief Reporter, Model Penal Code.

19. See N.Y. Legis. Doc. 1962, No. 41, p. 3.

20. Majority Leader, New York Senate, 1954-1964; Justice, New York Supreme Court, elected 1967.

Bartlett: No, this was the normal way in which a New York temporary commission was composed. I recall that the members of the Tweed Commission were appointed by a similar three-man board. Harrison Tweed, who was a non-legislator, was appointed as chairman of that Commission by the Governor.

Schwartz: Is the present revising group a nine-member Commission?

Bartlett: It was nine initially, but it was expanded from nine to twelve and from twelve to fifteen. There are fifteen members now.

C. *The Illinois Example*

Schwartz: To what extent were your decisions as to procedure, organizational structure, and so on, influenced by the Illinois experience?

Bartlett: As to structure, not at all, of course, because Illinois' was largely, I believe, a Bar Association effort, with the staffing done largely by law school personnel.²¹ I think it was felt that that procedure wouldn't work in New York because the Bar Association had been the dominant organization, to a certain extent, in the Tweed experience.

I was given a very free hand by the Legislative leaders and the Governor in choosing a staff. Upon our putting the staff together, we immediately talked with the people from Illinois and talked at length, of course, with Professor Wechsler. So, while the structuring in Illinois did not provide a precedent that we followed, our approaches were certainly influenced by what had been done in Illinois.

Schwartz: To sum up then, you did not follow the Illinois approach because you didn't want to repeat the mistakes of the Tweed Committee?

Bartlett: I suspect so. Again, I'm speculating because that decision was made in connection with the drafting of the bill and the setting up of the Commission. Interestingly enough, I had nothing to do with that process. That bill came from the Governor's office, and his then counsel, Robert MacCrate,²² was probably the strongest voice for the proposition. Also, a gentleman who was then serving as assistant counsel in the office, Howard Jones,²³ had a good deal to do with drafting the bill. He subsequently became a part of the Commission.

Schwartz: Is there anything to add concerning the strengths or weaknesses of the Illinois approach?

Bartlett: I suppose that having such an undertaking under the auspices of the Bar tends to remove it, in the public eye, from the realm of politics. This has its advantages and its shortcomings as well. We attempted to achieve a blending

21. See generally Bowman, *supra* note 3.

22. Counsel to the Governor, June 1, 1959—June 30, 1962.

23. Assistant Counsel to the Governor, 1961-62; appointed to the Commission, 1963.

of the political and non-political worlds by the composition of the Commission. The Vice-Chairman of the Commission was and still is Mr. Timothy Pfeiffer, a practitioner in New York City who has been extremely active in the American Law Institute and the Bar Association. Professor Wechsler certainly represented a non-political kind of appointment to the Commission. Yet, as a Legislator I surely was from the political world, even though my tenure as a Legislator was rather brief.²⁴ I think we would follow this procedure again, because ordinarily the product of any revisionary group has to pass muster with the Legislature of the state involved. Also, of course, a commission has to be financially maintained by the Legislature throughout its work.

D. *Choice of Staff*

Schwartz: You chose not to have a professional team do the actual drafting, as in Illinois, Michigan, and elsewhere. Why?

Bartlett: I don't think I consciously made a decision to exclude a professor from heading the staff. I did the staffing, in consultation primarily with Mr. Pfeiffer. I also had conversations with probably half a dozen other people during the summer of 1961 in an effort to find the right director. Among those suggested was a professor from an upstate law school. I was also interested in another professor, but I can't recall that I actually interviewed him. We finally decided on Richard Denzer as our Staff Director. He was experienced, though entirely as a prosecutor, having started with Tom Dewey as an assistant District Attorney in the anti-racketeering days, and having served in that office until he came with us in 1961. Among practitioners in the field of criminal law, Dick Denzer came the closest to a professional type. He certainly had a keen scholarly interest in the whole spectrum of criminal justice, probably without equal among either private practitioners, defense lawyers or prosecutors. But I would not say that I decided against a professor, or that we were looking for someone other than a professor. It was rather that among those suggested to me and with whom I talked, I thought Denzer was the best qualified.

Schwartz: How significant is it that Denzer was a prosecutor at the time?

Bartlett: I don't believe it weighted heavily with me. As a matter of fact, once he had been suggested to me, I'm sure my inquiries were directed primarily to determining whether or not he would carry a strong bias toward the prosecutive point of view. My inquiries of other people and my interviews with Mr. Denzer satisfied me that this was not the case. He is the kind of man who would go before the Court of Appeals and say: "We made a mistake in this case and here it is." He demonstrated to me, and others claimed for him, an objectivity which suited him for the work. I think our experience bore out this impression.

24. Elected to the New York Assembly, 1958.

Schwartz: Didn't he fill his staff largely with people from the prosecutor's office? Certainly those who did the most important work were former prosecutors.

Bartlett: Of our original staff, one was a professor from Dickinson Law School, Charles Torcia, who is again teaching there now; another was Peter Preiser who had worked a short time in Mr. Hogan's²⁵ office and then went into a broad, general, private practice for several years, which included defense work; Peter McQuillan had spent most of his practicing years in the prosecutor's office it is true, but I'm sure that Mr. McQuillan reflected the same kind of objective approach that I would ascribe to Mr. Denzer.

Schwartz: Why was the decision made to have full-time staff, as opposed to the kind of staff used in some of the other states? If you have a staff made up of law professors by and large, you're trading off whatever the law professors have against time. Was there a feeling that it was best to have a full-time staff, even if you didn't have off-setting expertise or balance?

Bartlett: For a study such as ours, I think that decision is largely made by the amount of the appropriation. The fact is that we were given \$150,000 as our initial appropriation and there has been little change annually ever since.²⁶ We haven't spent all of that amount. As a matter of fact, in the first two or three years, we spent two-thirds of it or less. So, if you receive the proper funds, you find and hire people to work full-time. I think that's what it came to.

In contrast, Illinois was very modestly funded and I believe that they could not consider the idea of a full-time staff. I'm not saying that that was necessarily the only factor involved, but it certainly is an important one.

As I recall, we started out at the very beginning with the concept of full-time employees. I was certainly influenced by what I considered to be a less than satisfactory experience with a number of commissions and joint legislative committees in New York State which had had to rely on part-time staffs. It seems to me that the same problem of employment exists with both working professors and private practitioners—clear allocation of one's effort between two or three tasks at one time is a difficult undertaking.

Schwartz: In developing your organization, what did you see as your chief problem—finding a staff?

Bartlett: That was certainly the most important problem and Mr. Pfeiffer and I agreed that we would consult with one another in this area. After we decided on Mr. Denzer as chairman, we asked him to make recommendations to us as to the rest of the staff. It was over the following four or five months that our staff grew from one to four. We also established an office in New York City.²⁷

25. District Attorney, New York County, since 1942.

26. During 1962 and 1963, the appropriation was \$180,000. N.Y. Sess. Laws 1962, ch. 130; N.Y. Sess. Laws 1963, ch. 268.

27. 155 Leonard St. (Room 654), New York 13, N. Y.

Earlier in our work, I should point out, we were sidetracked a number of times. For example, in mid-1961, *Mapp v. Ohio*²⁸ was decided. Immediately we were asked by the Legislature to draft provisions for the Procedure Code to take *Mapp* into account.²⁹ Later on we were diverted, although somewhat within our overall responsibility, in dealing specifically with *M'Naghten*.³⁰

Schwartz: Was there any concern about the political acceptability of the staff?

Bartlett: None whatever. The legislative leaders and the Governor at no time limited me as to my choices by any political considerations. As a matter of fact, of the four people I originally hired, three were not of my political faith. Denzer is a Democrat in a nominal sense, but he's never been active politically. McQuillan is a Democrat, although I really don't know whether he belongs to a club or not. Preiser is a Republican. I'm not positive, but I believe Torcia was a Democrat. In any case, I can certainly say that political affiliation played no part in our decisions as to the choice of staff.

E. Appropriations

Schwartz: How was the figure of \$150,000 arrived at?

Bartlett: I haven't the slightest idea. The Legislature in its 1961 budget appropriated the sum of \$150,000 which ultimately turned out to be a pretty good guess as to our needs. As I indicated previously, in '61 and again in '62, we spent considerably less than that; but our staff grew somewhat and our expenses increased when we started having hearings and reprintings and so forth. So, the amount was appropriate, although I have no idea how the figure was originally derived.

Schwartz: Have you ever had any difficulty in having your budget approved?

Bartlett: Never. In fact, in one year we spent \$5,000 more than had been appropriated and had no difficulty in obtaining a deficiency appropriation from the Legislature.

Schwartz: Why?

Bartlett: Apparently they had confidence in us. As to why they had such confidence I haven't the slightest idea.

F. Schedule

Schwartz: Did your work progress according to a pre-determined schedule?

Bartlett: I would say the work took a little longer than I had originally anticipated, although a good deal shorter than most people had predicted. We did

28. 367 U.S. 643 (1961).

29. N.Y. Sess. Laws 1962, ch. 954.

30. M'Naghten's Case 10 Clark & F. 200, 8 Eng. Reg. 718 (H.L. 1843). See N.Y. Leg. Doc. (1963) No. 8, pp. 16-26, reprinted in Prop. Pen. Law, App. B; N.Y. Legis. Doc. 1964, No. 14, p. 15; N.Y. Pen. Law, § 30.05 (McKinney 1967) [hereinafter cited as N.Y. Pen. Law].

nothing in '61 on our major undertaking, except to agree on some general principles of approach. We spent '62, '63 and '64 revising the Penal Law. In '65 it was passed.³¹ We worked in '65, '66 and '67 on the Procedure Code, and we have continued working in '68 on the Code.³² Each revision has taken about three years. I might have predicted originally that we'd finish a year or so earlier than we did, but I think our other assignments contributed at least in part to the delay. The use of consultants, particularly law school staff and students, might have accelerated the work somewhat.

II. THE OPERATION OF THE COMMISSION

A. *Initial Tasks*

Schwartz: Were your initial tasks given to you by the Legislature?

Bartlett: Yes, they were given to us by the Legislative leaders³³ or the Governor's office and we were happy to undertake them. These tasks had some utility in terms of our establishing an initial status with the Legislature. We were able to show them the type of work we could do very early.³⁴

Schwartz: In other words, you were a special law revision commission for the Legislature in the criminal law area?

Bartlett: That is correct. Also, starting with the 1962 session, the Governor's Office has always asked our opinion of any bills before him for signature relating to the criminal law.³⁵ In this connection, I didn't attempt to undertake a review of the law by the whole Commission; rather, I relied on the staff. Usually, we came to an agreed position on pending legislation and expressed that position to the Governor. We assumed this kind of role because the legislative process did not stop after we were created.

Bills continued to be passed and offered to the Governor to amend the criminal law in one particular or another.

B. *Initial Assumptions and Approaches*

Schwartz: When you began the project, what kind of premises or assumptions did you make?

Bartlett: Substantively, we decided first to devote ourselves to the Penal Law, rather than to the Criminal Procedure Code. That was an arbitrary choice, but I think it was the right one.

31. N.Y. Sess. Laws 1965, ch. 1030.

32. See Proposed New York Criminal Procedure Law (Edward Thompson Co. ed. 1967) [hereinafter cited as Prop. Crim. Proc. Law].

33. The legislative leaders serve as ex-officio members of the Commission. N.Y. Legis. Doc. 1962, No. 41, p. 3.

34. See N.Y. Sess. Laws 1962, ch. 954 and text accompanying note 29 *supra*.

35. E.g., N.Y. Sess. Laws 1962, ch. 986 (admissibility of eavesdropping evidence). See Governor's Memorandum, *id.* at 3677; N.Y. Sess. Laws 1968, ch. 546 (eavesdropping warrants). See generally Comment, 17 Buffalo L. Rev. 455 (1968).

Schwartz: Why was that choice made?

Bartlett: The decision was made without any particular basis other than that there seemed a greater need of revision of the Penal Law. I'm not so sure that that turned out to be true. However, it did make sense, in terms of the relation of the Penal Law to the Code, to deal with the substantive law first. We found it not very difficult to patch the Code periodically in order to make it work in harmony with the new Penal Law. That was at least a *relatively* simple job.

As to revision of the Penal Law itself, we first examined the whole existing Penal Law, applying this test to every article and every section: Does it express a principle of criminal liability that we need in a law in order that it be a *criminal law*?³⁶ We found, for example, that about a third of our penal provisions were really regulatory in character; the fact that penal sanctions were attached was only incidental to the regulatory character of the statutes.³⁷ Therefore, we recommended that these provisions be taken out of the Penal Law and put elsewhere. Included in this process were insurance regulations, agriculture and market regulations, franchise provisions and labor provisions.³⁸

After this stage, we worked with the remaining sections and attempted to define those principles of liability which we thought necessary to apply in each of the areas of the criminal law—crimes against the person, property crimes, and so forth. During this process, we found that there was a need for a much more elaborate General Provisions title than was presently in the law. The definitions in the old Penal Law were sketchy. Stated principles of liability and exemption were scattered throughout the statutory law and the case law. We determined that we had to codify those principles, as the Model Penal Code had. It's fair to say that as we went about our work, we kept glancing at the Model Code; a side-by-side comparison now will suggest quite a few similarities in organization and principle in a number of areas. On the other hand, we found our task was much more than just trying to adapt the Model Code to New York.

Schwartz: You've been talking about "we." Were there differences concerning any of these approaches among the members of the staff or the Commission or between the two groups as a whole?

Bartlett: I spent a good deal of time in '61 with the staff, and we agreed on approaches which were subsequently submitted as proposals to the Commission. Indeed, this is pretty much the way we worked throughout our effort; and the Commission accepted the proposals. As I indicated before, we were distracted at first by other assignments. Thus, '61 and early '62 were devoted partly to our agreeing on the method of attack for the major task and partly to a discussion of specifics. In particular, we talked about formulations that had been

36. See N.Y. Legis. Doc. 1962, No. 41, pp. 14-18.

37. See *supra* note 8 and accompanying text.

38. For complete distribution table, see N.Y. Sess. Laws 1965, p. 1717.

proposed by the staff in relation to *Mapp* and some other questions. During these discussions, general agreement among the members of the Commission was reached as to the main approach. Such agreement was not present at all, of course, when we later began to deal with specifics.

C. *Difficult Areas: Expected and Actual*

Schwartz: What did you initially think would be your most difficult areas in the substantive law?

Bartlett: It's difficult to make a valid assessment now, but it's fair to say that we did accurately identify the Justification article³⁹ as a difficult area. However, I can't really say that we predicted the precise problems that eventually arose. Perhaps our problems were in a sense predictable, since broad principles of justification had never before been articulated in a statute for New York. We formulated our original proposal in '64,⁴⁰ and then held hearings on it. We then amended it substantially before we submitted it to the Legislature in '65.⁴¹ It was substantially changed again in 1968.⁴²

As to other areas, we knew that the *M'Naghten* rule would be a difficult problem.⁴³ The battle had been raging over that doctrine for years and years.⁴⁴ We also anticipated difficulty in the homicide areas because we were convinced that the formulation of the crime of murder, with its degrees, was not satisfactory.⁴⁵ The death penalty itself⁴⁶ was, of course, a highly emotional issue, which acquired an importance in the public eye⁴⁷ which we, as a Commission, never assigned to it.

Schwartz: Did these anticipated problem areas actually turn out to be the ones that were troublesome with respect to drafting, substance, and public reaction?

39. N.Y. Pen. Law, art. 35.

40. Prop. Pen. Law.

41. Compare Prop. Pen. Law, art. 35 with Revised Penal Law, art. 35 (Edward Thompson Co. ed. 1965). See N.Y. Legis. Doc. 1965 No. 25, pp. 75-86.

42. N.Y. Sess. Laws 1968, ch. 73.

43. See *supra* note 30 and accompanying text.

44. See generally Fingarette, *The Concept of Mental Disease in Criminal Law Insanity Tests*, 33 U. Chi. L. Rev. 229 (1966); Glueck, *Law and Psychiatry* (1962); Guttmacher and Weihofen, *Psychiatry and The Law* (1952); Kuh, *The Insanity Defense—An Effort to Combine Law and Reason*, 110 U. Pa. L. Rev. 771 (1962); Morris, *Criminal Insanity: The Abyss Between Law and Psychiatry*, 12 Record of N.Y. C.B.A. 471 (1957); Swartz, "Mental Disease": *The Groundwork for Legal Analysis and Legislative Action*, 111 U. Pa. L. Rev. 389 (1963).

45. Compare Former N.Y. Pen. Law, §§ 1044, 1046 with N.Y. Pen. Law, § 125.25. For a thorough discussion of the development of the law on homicide in New York, see N.Y. Law Revision Commission for 1937, *Communication and Study Relating to Homicide*, N.Y. Legis. Doc. 1937, No. 65, pp. 517-869.

46. New York became the last American jurisdiction to reject the mandatory death penalty for kidnapping and murder in the first degree (deliberate and premeditated design). The optional death penalty was enacted in 1963. N.Y. Sess. Law (1963), ch. 994. Compare Former N.Y. Pen. Law, § 1045 with N.Y. Pen. Law, § 125.30. See *infra* notes 54, 55, 56 and accompanying text.

47. Cf. N.Y. Sess. Laws 1963, at 2018, 2076.

Bartlett: Actually, at the time of passage by the Legislature, the Justification article turned out to be no problem at all. Nobody paid the slightest attention to it, and I don't recall a question being raised concerning it during the 1965 session. We were uneasy about it because it was difficult to draft and because it was terribly important. But I don't think the Legislature or the public attached much importance to it at the time. As it turned out, the two areas that became really significant during the '65 session, during which we were trying to have the package passed, were the death penalty provisions, and sex crimes.⁴⁸ Oddly enough, and I think it's odd because I didn't ascribe that importance to these two aspects of the sex crime area, our proposals to eliminate adultery as a crime⁴⁹ and consensual sodomy between adults as a crime⁵⁰ drew the sharpest fire. Indeed, amendments were offered to the Commission's proposal only as to these two particulars. Both of the amendments prevailed,⁵¹ and adultery and consensual sodomy were designated crimes as part of the new law.⁵²

Schwartz: Wasn't there also a "no sock" amendment⁵³ to preserve the right to use force to resist an unlawful arrest?

Bartlett: Yes, but that came about in a different way. The Combined Council on Law Enforcement Officials urged separate passage of their proposal to prohibit forcible resistance to unlawful arrest. It was defeated in the Assembly. I think we can now say that it was not good judgment to try for separate passage; I could not risk going to the floor with a package containing a proposition that had just been defeated. So, the proposal was withdrawn, not because we were abandoning our stand on the question, but because pragmatically we could not afford to have that provision jeopardize passage.

Schwartz: You must have anticipated that the sex area and the death penalty would at least be controversial.

48. Prop. Pen. Law, art. 135; N.Y. Pen. Law, art. 130.

49. "A majority of the Commission is of the opinion that the basic problem [of adultery] is one of private rather than public morals, and that its inclusion in a criminal code neither protects the public nor acts as a deterrent. In fact, it may well be said that proscribing conduct which is almost universally overlooked by law enforcement agencies tends to weaken the fabric of the whole penal law." Prop. Pen. Law, art. 260, comm'n staff notes.

50. "Under existing law [Former Pen. Law § 690], deviate sexual acts between consenting adults constitute a crime under all circumstances. A majority of the Commission is of the opinion that, in the light of modern sociological and psychiatric principles, criminal prosecution of homosexual acts privately and discreetly engaged in between competent consenting adults, serves no salutary purpose. This follows the approach adopted both by the Model Penal Code [Tentative Draft No. 4, 276; Model Penal Code, § 213.2 (P.O.D.)] and by the 1961 revision of the Illinois Criminal Code [Ill. Ann. Stat. ch. 38 § 11-3 (Smith-Hurd 1964)]. Of course, such conduct is subject to prosecution when it constitutes disorderly conduct . . . or loitering. . . ." Prop. Pen. Law, § 135.50, comm'n staff notes.

51. N.Y. Sess. Laws 1965, chs. 1037, 1038.

52. N.Y. Pen. Law, §§ 253.17 (adultery), 130.38 (consensual sodomy).

53. N.Y. Sess. Laws 1965, ch. 1039.

Bartlett: Yes indeed. As it developed, of course, the death penalty question was resolved by separate legislation.⁵⁴ However, the Commission played a significant role in that occurrence because it was our report which started the ball rolling in the Legislature that winter.⁵⁵ We recommended total abolition, but this was amended to include the two exceptions that are now in the law.⁵⁶

Schwartz: Did you have any inkling during your hearings that the unanticipated problems with the sex area might arise?

Bartlett: Some. By '64 we had Assemblyman Volker and Senator Hughes as members. They were the two sponsors of the amendments concerning the sex crimes.⁵⁷ They voted against the proposals in the Commission and warned us at that time that they planned to go to the floor with that question. So eventually, we actually anticipated the problem. As it turned out the only amendments that developed were those that originated with our own Commission. I do not include the no-sock amendment which, as I indicated previously, was separately handled.⁵⁸

Schwartz: In other words, wherever the Commission was unanimous, the package submitted went through without any great difficulty.

Bartlett: There were many provisions on which we were not unanimous, but they also went through without great difficulty. As to the two areas however, two members of the Commission chose to sponsor amendments to the package in the Legislature.

54. N.Y. Sess. Laws 1963, ch. 994. See Commission's Memorandum accompanying this bill, *id.* at 2018.

55. *Id.* at 13-16.

56. N.Y. Pen. Law, § 125.30 provides:

Murder; sentence.—1. When a defendant has been convicted by a jury verdict of murder as defined in subdivision one or two of section 125.25, the court shall, as promptly as practicable, conduct a further proceeding, pursuant to section 125.35, in order to determine whether the defendant shall be sentenced to death in lieu of being sentenced to the term of imprisonment for a class A felony prescribed in section 70.00, if it is satisfied that:

(a) Either:

(i) the victim of the crime was a peace officer who was killed in the course of performing his official duties, or

(ii) at the time of the commission of the crime the defendant was confined in a state prison or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or having escaped from such confinement or custody the defendant was in immediate flight therefrom; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime; and

(c) There are no substantial mitigating circumstances which render sentence of death unwarranted.

2. If the court conducts such a further proceeding with respect to a sentence, the jury verdict of murder recorded upon the minutes shall not be subject to jury reconsideration therein.

57. N.Y. Sess. Laws 1965, chs. 1037, 1038.

58. See *supra* note 53 and accompanying text.

Schwartz: So, the Legislature itself gave you almost no trouble. It was really members of your own Commission who caused problems—is that correct?

Bartlett: That is correct. Some members of the Legislature did come out very strenuously against the package. Assemblyman Becker, from Orange County, led the charge in the Assembly. He thought that the Commission's work was an egghead, ivory tower approach to the criminal law. He pointed to the sex crime area as an example. Unfortunately, I think Dan spoke for the traditional point of view: in order to combat crime, you need tough cops and tough laws.

Schwartz: Did any opposition to your bill come from the other side? For example, did you hear from Civil Liberties groups or defense lawyer organizations?

Bartlett: The opposition was primarily conservative. Despite that fact, the ACLU opposed the package and, indeed, urged that the matter not be considered in '65.⁵⁹ The liberal members of the two Houses voted for the package, although my recollection is that a couple of them expressed reservations.

Schwartz: In what area, if you recall?

Bartlett: The sentence structure was said to be too harsh. Of course, Dan Becker criticized it as being far too weak. However, the opposition from the liberal members of the two Houses did not take the form of negative votes. They simply expressed concern and reservations. Of course, it is to be remembered that the new Penal Law was not to take effect until September 1, 1967, and I stated this a number of times on the floor of the House. In other words, we were going to give it another hard look before it took effect so as to be as certain as possible that all the bugs were eliminated.

D. Interested Groups

Schwartz: In terms of the people interested and involved, who cared about the revision and what interest did they have?

Bartlett: At least early in our work, we did not find any great expression of interest on the part of many groups; but interest developed as we went along. We had gone about our work very quickly. There had been a minimum of fanfare, particularly in regard to our initial efforts.

Schwartz: Was that deliberate?

Bartlett: Yes. I thought it would be more conducive to work in a quiet atmosphere; we knew we had a long and difficult task ahead of us. Also, I thought that predictions at an early time as to what we were going to accomplish could prove dangerous for us later on. So, from 1962 through 1964, we worked with a minimum of publicity and little contact with organizations or groups whom you might identify as being interested in the processes of criminal justice. Actu-

59. See 13 Civil Liberties In New York No. 6, p. 2 (Sept. 1965).

ally, there were no hearings until 1964. The staff, of course, was in constant contact with prosecutors, bar association committees concerned with criminal law, and the National Council on Crime and Delinquency. The latter group was consulted particularly in connection with the sentencing proposals.⁶⁰ But this again was a quiet kind of process. Although we might have met often with this group or that, we sought them out; it wasn't a matter of a group coming to us.

Schwartz: Was there any contact at this time with any police department or police organization on an informal basis?

Bartlett: Not a great deal. Of course, the staff members knew the people in the New York City Police Department. When they had a question about how something would work from the police point of view, it was natural for them to turn to the New York City Police Department for reaction. However, I would not say that there was a great deal of dialogue with the police during the drafting process. I'm not so sure that the police should have a significant role in the formulation of what ought to be proscribed and what ought to be permitted by society. Their job is to enforce the law as it's developed and given to them. We might well have encouraged more dialogue with the police in connection with the now well-known Article 35, on the use of force; but certainly the police had an opportunity to express their views in 1964 when we started hearings.

Schwartz: Since you have been a member of the Legislature for some years, you have been exposed to interest groups and lobbys in both the civil and criminal areas. What do you see as the usual interest of groups and lobbys in criminal law, and how are these different in nature, operation or origin from those which operate in civil law?

Bartlett: Most of the organizations who express themselves in connection with the criminal law are those which represent professionals in the various aspects of the system of criminal justice. The District Attorney's Association is an important group; the Bar Association Criminal Law-Criminal Justice Committees are important; the Police Benevolent Associations are significant to the extent of their lesser interest. The National Council on Crime and Delinquency is the only citizens group from whom we heard, I believe, and they also have a very substantial professional representation in their membership.

Schwartz: What about the American Civil Liberties Union?

Bartlett: We did hear from them also. Although, regrettably, we did not receive any significant comment from them in the course of our hearings, I did hear from them in '65, just prior to consideration of the proposal by the Legisla-

60. The Commission's work on sentencing was later criticized by Sol Rubin, Counsel for the National Council on Crime and Delinquency. Murrah and Rubin, *Penal Reform and The Model Sentencing Act*, 65 Colum. L. Rev. 1167 (1965).

ture. They asked for more time in which to make an evaluation of the proposal and give their reactions. I must say that I was a little disappointed in the ACLU's delay in response. I recognize that we gave these groups quite an amount to digest and evaluate; but some groups were able to do it.

Schwartz: Could you give us a summary of how you related to such groups as, for example, the judiciary, the Judicial Conference, the bar associations, law enforcement agencies, and law schools, the Negro communities and civil liberties groups? Was there any attempt at organized consultation, or was it largely through a series of public hearings which anyone could attend?

Bartlett: First of all, beginning in the middle of '64 and until late in the session of '65, the staff and I were constantly meeting organized groups, explaining the proposal through question and answer periods. The real purpose behind our circulating a study bill in '64⁶¹ was to afford opportunity for reaction on the part of those concerned with the operation of criminal law. Most groups responded by asking us to talk to them about it and then by expressing themselves in our hearings.

With specific respect to the judiciary, the Supreme Court Judges Association of New York formed a number of committees to study particular parts of the study bill and to report back.

Schwartz: Were those reports influential?

Bartlett: They approved of the bill by and large, with the exception of a handful of New York City judges who objected strenuously to doing away with Article 7A of the Correction Law,⁶² and the so-called "zip-3" sentence for prostitution.⁶³ The judiciary as a whole did not have a great deal to say at the hearings; however, they gave us the benefit of their committee reports which were, in general, approving.

Schwartz: When they did not approve, were they influential in changing things?

Bartlett: I wouldn't say they were not. The fact is that we went through an intensive process in '64 re-evaluating our product ourselves. Whether and how much we were inspired by our own critical analysis or by suggestions from others would be impossible to sort out. However, it's fair to say that all the interested groups who expressed themselves to us played a significant role in our decision to re-evaluate certain sections concerning which particular doubts or criticisms had been raised.

61. Prop. Pen. Law.

62. N.Y. Sess. Laws 1967, ch. 324, § 6. See generally Prop. Pen. Law, App. A, "Survey of the New York State Sentencing Structure As Of 1963."

63. Prior law treated a prostitute as a vagrant. N.Y. Code Crim. Proc. § 887(4) (McKinney 1958). The prostitute could be committed to a reformatory or other correctional institution for up to three years or to a county jail or other penal institution for up to one year. *Ad.* § 891-a. The one-year limitation derived from art. I, §§ 2, 6, N.Y. S. Const. Present law treats prostitution as an individual substantive offense. N.Y. Pen. Law, § 230.00. As a violation, the maximum sentence is fifteen days, N.Y. Pen. Law, § 70.15(a).

Schwartz: Was any special effort made to involve Negroes or other minority groups in your deliberative or consultative processes? Would you make such an effort now?

Bartlett: We didn't, and I doubt that we would now. For example, in terms of undertaking consultation with the NAACP, I don't think we would. Of course, we presently have three Negro members on the Commission;⁶⁴ we had one in the beginning.⁶⁵

Schwartz: In connection with that, is there any distinction that you can perceive between the public relations or other operations of police organizations, like the PBA, and the actions of the official departments themselves?

Bartlett: Certainly, I think most of the public uneasiness about the use of force was generated by the attacks launched on it by the line organizations—the PBA, the Police Conference. The only police *administration* I can recall as being in the forefront of the critics of the new Penal Law was the Buffalo Police Department.⁶⁶ The State Police indicated to us that they could live and work with these provisions; the New York City Police Department's administration also indicated that they could work with them. As a matter of fact, the New York City Department said that they approved of the conceptual basis of our formulation. However, the New York Police did a couple of suggestions for change which were adopted. Commissioner Leary⁶⁷ pointed out that in the mugging area, it was awfully difficult to sort out the crime that involved the use of deadly physical force from that which did not.⁶⁸ It was suggested that

64. Howard Jones, formerly Assistant District Attorney of New York County and Assistant Counsel to Governor Rockefeller, member of New York Parole Board; Charles Rangel, Assemblyman; Archibald Murray, formerly Assistant District Attorney of New York County and Assistant Counsel to Governor Rockefeller, Counsel to New York Crime Control Council.

65. Howard Jones.

66. The Buffalo Police Department primarily objected to the justification provisions of Article 35. Aside from arguing that these provisions were difficult to understand, the Department also objected to the limitations on the officers' use of *deadly* physical force. The Department asked that "consideration be given to defining the force permitted to be used in terms of the force necessary to achieve a statutory objective rather than in terms of the means of force that can be used."

The Department also objected to the repeal of that part of § 1055 of the former Penal Law which expressly justified homicide committed by an officer in lawfully suppressing a riot or preserving the peace.

Finally, the Department disapproved of the repeal of §§ 1841 and 1857 of the former Penal Law which had provided that an officer was guilty of a misdemeanor upon wilful neglect to perform his duty. These sections were replaced by N.Y. Pen. Law, § 195.00(2), which provides, in part: "A public servant is guilty of official misconduct [a misdemeanor] when, with intent to obtain a benefit or to injure or deprive another person of a benefit . . . (2) He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office." The Department criticized this provision because "it offers an officer who wishes to withhold performance of his duty, even to the extent of turning his back on a victim being murdered, the opportunity to do so without suffering any penalty . . ." Transcript of testimony of Deputy Commissioner Thomas R. Blair, Buffalo Police Department, before the Temporary Commission on Revision of The Penal Law and Criminal Code, on October 24, 1967, on file with the Buffalo Law Review.

67. Commissioner, Police Department, New York City.

68. See N.Y. Pen. Law, § 35.30, as amended N.Y. Sess. Laws 1968, ch. 73.

if a *dangerous* crime, such as robbery, were perpetrated, deadly physical force, solely to effectuate an apprehension, should be allowed.⁶⁹

III. ENLIGHTENED APPROACHES

A. *Revision of Criminal Procedure*⁷⁰

Schwartz: Are you doing things differently now with the Procedure Code, based on your experience with the Penal Law? For example, are you more aware of which people to contact?

Bartlett: Yes, we learned some lessons from our experience with the Penal Law.⁷¹ We are more aggressively seeking reaction from groups that we think might have an informed point of view about one aspect or another of the Code. However, something we did not seek has developed as a result of the controversy over the use of force. Groups who pretty much slumbered through the '64-'65 experience are now paying close attention to our proposals and are articulating their points of view. I refer particularly to the police. The police never really expressed themselves in '64 and '65 in connection with use of force, except in a very off-hand way. A spokesman for the Chiefs of Police informed us during a '64 hearing that they were concerned about the use of force sections of Article 35. We told them that we were too, and we did substantially rewrite those sections before the '65 submission to the Legislature. We urged this group to give us any suggestions it had for draftsmanship in connection with Article 35. The PBA and the Police Conference, according to my recollection, did not express themselves in connection with use of force.

So today we are more aggressively seeking out reaction in advance. But more important than that, these groups are now coming to our hearings and expressing themselves.

Schwartz: What about organizing your efforts toward the Legislature?

Bartlett: We are not doing a great deal differently in that respect. I spoke earlier about the role I was supposed to play, and I hope I did play in establishing a viable link between the work of the Commission and the work of the Legislature. I found that that link with the Legislature, especially since I'm no longer a legislator, required shoring up. So we now have more legislative members than we had previously.⁷² It is evident that in connection with the Code we are going to require excellent communications with the Legislature. We will need better rapport than we had in '65, simply because I believe the

69. See N.Y. Pen. Law, § 35.15, as amended N.Y. Sess. Laws 1968, ch. 73.

70. Prop. Crim. Proc. Law; see N.Y. Legis. Doc. 1968, No. 29, pp. 11-352.

71. See generally N.Y. Legis. Doc. 1963, No. 8, pp. 45-49; N.Y. Legis. Doc. 1967, No. 6, pp. 6-12.

72. The 1962 Commission included two Assemblymen, Bartlett and Kapelman. N.Y. Legis. Doc. 1962, No. 41, p. 3. The 1968 Commission includes two Senators, Dunne and Smith, and three Assemblymen, Bartlett, Rangel, and Altman. N.Y. Legis. Doc. 1968, No. 29, p. 3.

Legislature will be more questioning now. This will be due largely to their past experience with the use of force controversy.

Schwartz: Also, isn't the Code likely to be far more controversial? The whole Supreme Court revolution is involved in the Code. In contrast, the Penal Law had in a sense been forgotten for a long time, and still is, except for the revising enterprises.

Bartlett: Yes, this is so, and I think that citizen groups will show greater interest in the Code. Certainly the organizations within our black communities and those concerned with rights of the indigent are more concerned about the bail,⁷³ arrest,⁷⁴ and arraignment provisions,⁷⁵ than they are about the definition of murder.⁷⁶ This is also true of the citizenry as a whole. Although, interestingly enough, so far we have not had spokesmen for any organized minority groups, such as the NAACP, at any of our hearings to date. We are anxious to hear from them.

B. *The New Penal Law*

Schwartz: Are there any decisions, organizational, political or other, that you think were mistakes?

Bartlett: Actually, if I say no, I'll sound terribly smug. I think that I would urge the Legislature itself to hold hearings on our proposal, instead of relying solely on our hearings, as they did in '65. I would expect to ask the Codes Committee to meet with me and the staff to go over the proposal in greater detail and depth than we did in '65. If our efforts are stepped up in any part of our work, it would probably be in trying to improve the dialogue between the community and the Commission.

Schwartz: Are there any areas of substantive law that you think you might treat differently now? That is, are there any ideas or areas where the staff is considering submitting further amendments on the basis of the admittedly skimpy experience so far?

Bartlett: We've made some suggestions.⁷⁷ With the exception of the use of force,⁷⁸ however, none are of significant importance. But, this is a continuing process. I'm sure that other problems which we haven't yet discovered will bubble to the surface. If warranted, we certainly intend to continue to make suggestions for improvement. I can't identify any one area that we surely would

73. Prop. Crim. Proc. Law, arts. 380, 385, 390, 395. See, e.g. Fabricant, *Bail—A Preferred Freedom*, *infra* at 303.

74. *Id.* arts. 60, 70.

75. *Id.* arts. 55, 85, 90.

76. N.Y. Pen. Law, § 125.25.

77. See, e.g., N.Y. Sess. Laws 1967, ch. 791. See also N.Y. Legis. Doc. 1967, No. 6, pp. 4-6.

78. N.Y. Pen. Law, § 35.15, as amended N.Y. Sess. Laws 1968, ch. 73.

have done differently so that I could warn others who might undertake this work elsewhere. I think perhaps we would have approached much more carefully, and with greater publicity, the task of defining by statute the principles of justification.⁷⁹

IV. SUGGESTIONS TO OTHER STATES

Schwartz: Let me conclude this interview by asking you an overall question: what suggestions would you make to other states planning revision of their Penal Laws?

Bartlett: I would recommend the vehicle of a Commission as we utilized it in New York. I would strongly urge a good mix as to its composition and, in retrospect, I probably would recommend that a representative of the police be a member. A sociologist or penologist might do some good, although Peter Preiser of our staff has turned into a pretty good sociologist and penologist. But he's a staff member and not a Commission member. I would certainly urge that the academic community be represented on the Commission itself and that there be adequate legislative representation. Largely, I think the composition of our Commission is adequate.

I also think that if adequate funds can be secured from the Legislature, a full-time staff should be hired. I would further suggest a greater use of consultants than we employed. Our staff pretty much did its own work. There were few if any formal consultants. I think we might have used more than we did.

Schwartz: Why?

Bartlett: To broaden the bases of support for our effort; but certainly not from any feeling of deficiency in the quality of our work.

79. N.Y. Pen. Law, art. 35.